No. 10666

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FLORENCE DAVIS SMITH and HARVEY W SMITH,

Appellants,

vs.

THE FEDERAL LAND BANK OF BERKELEY and FEDERAL FARM MORTGAGE CORPORATION,

Appellees

OPENING BRIEF OF APPELLANTS.

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Jurisdiction.

The Order of the District Court for the Southern District of California, Northern Division, setting aside and vacating the Findings of Fact and Conclusions of Law and Order of Hon. Leonard M. Ginsburg, Conciliation Commissioner, of December 17, 1942, and ordering that the citrus grove of the debtors be stricken from the schedules and that Appellees be permitted to exercise the power of sale under their deeds of trust was made and entered on September 17, 1943 [68-74].

Appellants' Motion for new trial, Petition for Rehearing and Motion to Vacate Judgment, Order and Findings

of September 17, 1943, was filed on October 16, 1943 [74-78] and on the same day an Order was entered by the District Judge stating that said Motion and Petition had been seasonably presented, and granting permission to file and setting the matter for hearing on October 25, 1943 [78].

On October 25, 1943, an Order was made denying said Motion for new trial, Petition for Rehearing and Motion to Vacate Judgment [102-103].

Appellants' Notice of Appeal to this Court was filed on October 27, 1943 [84-85] and served upon Appellees by mail on October 28, 1943 [85].

Orders extending time to file the record and docket the Appeal were seasonably entered on November 24, 1943 [105] and December 18, 1943 [106] extending such time to January 20, 1944. The record was duly filed on January 20, 1944 [169].

The District Court had original jurisdiction of this cause on Appellee's Petition for Review of the Order of the Conciliation Commissioner entered December 17, 1942. Section 39c of the Bankruptcy Act (Title 11, Sec. 67, U. S. Code, Ann.)

The jurisdiction of this Court is invoked under Section 24 of the National Bankruptcy Act (Title 11, Sec. 47, U. S. Code, Anno.)

Assignments of Error.

1. The District Court erred in holding that the letter of attorney, Frederick E. Stone dated March 21, 1941 and the Possession Agreement signed by Appellant, Florence Davis Smith on May 1, 1941, constituted a waiver of Appellants' rights to amend their Petition under subsection (s) of Section 75 of the Bankruptcy Act [71-73].

2. The District Court erred in refusing to grant the Motion for a New Trial, Petition for Rehearing and Motion to Vacate the Judgment in order to permit the introduction of two additional letters from Mr. Stone and a reply thereto relating to the question of the alleged waiver.

3. The Court erred in finding that there was a binding agreement to waive the benefits of subsection (s), since there was no consideration for said alleged agreement.

4. The Court erred in holding that Attorneys Frederick E. Stone and LeRoy McCormick had power by admissions to waive Appellants' rights to be adjudicated under subsection (s).

5. The District Court erred in holding that the rights of Appellants as farmer-debtors to file an Amended Petition under subsection (s) of Section 75 of the Bankruptcy Act could be waived.

6. The Court erred in holding that the term of Appellants' extension proposal expired on November 2, 1940.

Statement of the Case.

Two principal questions are presented on this Appeal:

1. Did Appellants by their conduct, waive their right to petition the Court to be adjudicated bankrupts under subsection (s) of the Bankruptcy Act?

2. As a matter of public policy, could the Appellants, as farmer-debtors, waive that right?

Appellants are farmers operating a navel orange and grapefruit grove near Porterville in Tulare County [4]. Appellees hold notes against said property secured by two trust deeds [5].

Appellants filed a Petition under Section 75(a-r) of the Bankruptcy Act in September, 1937 [2]. An Extension Proposal, dated November 2, 1937, was submitted by Appellants [3-17], accepted by the required majority of creditors [2], and approved by the then Conciliation Commissioner on December 14, 1937 [19], and thereafter approved by the Court [2-3].

On February 18, 1941, Appellees filed a Petition asking for an Order terminating the proceedings or authorizing them to proceed to sell under their deeds of trust [92-99]. On March 12, 1941, a hearing was had on this petition [46]. On March 21, 1941, Attorney Frederick E. Stone wrote a letter to Mr. Hoffmann of counsel for Appellees [166] and Mr. Hoffmann replied on March 26, 1941 [34].

The District Judge afterward held that these two documents constituted a waiver by Appellants of all right to be adjudicated under subsection (s) [65]. Three further letters between these two attorneys dated in March and early April, 1941, are in the present appeal record as exhibits to an affidavit in support of the Petition for Rehearing [81-83]. The contents of all five letters will be discussed hereafter.

On May 1, 1941, Mr. Hoffmann and Mr. Andrews, representing the Appellees, called on Mrs. Smith of Appellants and obtained her signature on a possession agreement [139-141] which the District Judge afterward held was further evidence of waiver [65] in spite of Mrs. Smith's explanation of these events [144-145, 141-142, 148].

On February 9, 1942, Conciliation Commissioner Ginsburg made certain Findings of Fact and Conclusions of Law regarding the Petition filed February 18, 1941, and ordered that Appellees with the consent of the Court might proceed to exercise their power of sale [39-43].

On June 11, 1942, Appellants' Amended Petition asking that they be adjudicated bankrupts under subsection (s) of Section 75, was filed in the District Court [20-21] with the certificate of the Conciliation Commission recommending such adjudication [22-23]. On the same day, Appellants were duly adjudicated bankrupts under subsection (s) by an Order entered by Hon. Paul J. McCormick, United States District Judge [23-24].

On July 21, 1942, Appellees filed a Petition before Commissioner Ginsburg, praying that the adjudication of Appellants under subsection (s) be set aside and vacated and these proceedings be dismissed or that Appellants' grove be stricken from the schedules [24-33]. A hearing was had before the Commissioner on September 3, 1942, and certain testimony taken of Appellant Florence Davis Smith and of Percy A. Smith of counsel for Appellees and certain offers of proof made [118-168]. On December 17, 1942, this Petition was denied by the Commissioner, who held Appellants within their rights in filing under (s). A Petition for Review was filed by Appellees [49-55], and in due course the Commissioner filed a Certificate for Review with certain exhibits attached [56-60].

In the meantime on November 2, 1942, the Commissioner entered an order directing that possession remain in Appellants, fixing the rental at $500.00 a year and staying proceedings for three years [99]. This order has never been appealed from.

Thereafter the cause came on for review before Hon. C. E. Beaumont, Judge of the District Court. In a Memorandum Opinion and Order dated and filed July 9, 1942, Judge Beaumont held that Appellants had waived their right to be adjudicated under subsection (s) [64-68] and that such waiver was shown generally by the record and particularly by the letter of Frederick E. Stone, then attorney for the Appellants, dated March 21,

1941 [166-167] and the reply of M. G. Hoffmann, attorney for Appellees, dated March 26, 1941 [34-36], and the execution of a possession agreement by Appellant, Florence D. Smith [36-38]. On September 17, 1943, Judge Beaumont entered Findings of Fact, Conclusions of Law and an Order setting aside and vacating Findings of Fact, Conclusions of Law and Order of Commissioner Ginsburg, dated December 17, 1942, and striking from the debtors' schedules, Appellants' grove.

Appellants' Motion for new trial, Petition for rehearing and Motion to vacate the Order of September 17, 1943, was filed herein October 16, 1943 [74-78] and supported by the affidavit of Allan J. Carter, present attorney for Appellants, attaching as exhibits copies of two additional letters from Attorney Frederick E. Stone to Mr. Hoffmann dated March 27, 1941 and April 3, 1941 and of Mr. Hoffmann's reply dated April 9, 1941 [79-83], which Appellants claim establish that no waiver occurred.

The District Court, on October 16, 1943, entered an Order that this Petition had been seasonably presented and set it for hearing on October 25, 1943 [78]. On the latter date an Order was made denying said Motion for new trial, Petition for rehearing and Motion to vacate [102-103]. This Appeal followed [84-85].

ARGUMENT.

I.

Appellants Did Not Waive Their Right to Be Adjudicated Bankrupts Under Subsection (s) of Section 75 of the Bankruptcy Act.

The District Judge in his Memorandum Opinion [65] and in his Findings [71-73] and Conclusions of Law [73] reversed the Conciliation Commissioner and held that Appellants had waived all right to be adjudicated under subsection (s) in so far as the grove was concerned.

This ruling in effect amounted to the setting aside of the adjudication under (s) and a dismissal of the proceedings, since the grove was the only real estate held by Appellants [4-5].

The District Court held that the letter dated March 21, 1941, from Mr. Frederick E. Stone, then attorney for Appellants, to Mr. Hoffmann, one of Appellees' attorneys [166], and Mr. Hoffmann's reply of March 26, 1941 [34], and the possession agreement signed by Mrs. Smith on May 1, 1941 [36], constituted a waiver [65, 71-73].

We respectfully submit that a study of these three documents together with an analysis of Mrs. Smith's testimony and offers of proof [123-165] establish that there was in fact no waiver made.

It is true that Mr. Stone in his letter of March 21, 1941, did say that he had discussed the matter of going under (s) with Appellants and that they had concluded to abandon the property and let the matter go by default if the Randolph Marketing Company could be protected

as to the grapefruit then on the trees. However, Mr. Stone wound up that letter with a statement that he would appreciate an immediate reply since he was "holding the matter in abeyance" pending an answer [167]. Across the bottom of this original letter was a notation by Mr. Andrews of the Federal Land Bank [139] reading in part as follows:

> "O. K. to *consent to Randolph harvesting and marketing grapefruit* for returns *up to their outlays. If Smiths will request dismissal of proceedings so we can proceed to F. C.*—also Smiths give possession to Bank so as to care for property pending F C sale" [167]. (Emphasis ours.)

Mr. Hoffmann's reply of March 26, 1941, did not accept the alleged waiver *proposal* made in Mr. Stone's letter but on the contrary attached conditions to any acceptance which were never at any time complied with.

Mr. Hoffmann's letter read in part:

> *"We hereby agree that, if the debtors will withdraw their opposition to our petition and consent to the Conciliation Commissioner's order which was prayed for therein,* and *if* the Conciliation Commissioner will make the order either recommending the dismissal of the proceedings, *and such recommendation is followed by a dismissal order signed by a judge, or if the Conciliation Commissioner will make an order authorizing us to proceed with trustee's sale under one or both of our deeds of trust, and if the debtors will, after entry of the necessary order, execute and return the enclosed possession agreement,* the Randolph Marketing Company shall have the right to enter upon the property, pick the grapefruit and retain from the proceeds thereof, in so far as such pro-

ceeds shall be sufficient, the sum necessary to reimburse said marketing company for outlays made under authority of the Conciliation Commissioner, for the upkeep and care of the property.

"* * * *we see no reason for authorizing the Randolph Marketing Company to take more of the proceeds than will be necessary to reimburse it for such advances.*

"In order to expedite the matter we are also enclosing an order which may be signed by the Conciliation Commissioner. We prefer to have this order signed at once and a conformed copy returned to us with the executed possession agreement. Thereafter we believe it would be advisable for you to present to the Conciliation Commissioner a petition for dismissal of the proceedings, signed by the debtors. The Commissioner should endorse his recommendation on such petition and forward it to the judge. Since the proceedings are merely under Section 75(a-r), we believe that they may be thus dismissed summarily" [35-36]. (Emphasis ours.)

The conditions that debtors must withdraw their opposition to Appellees' petition and must consent to the Conciliation Commissioner's order prayed for in said petition were neither of them ever met. The Conciliation Commissioner never made an order of dismissal. While nearly a year later he made an order authorizing the Appellees to proceed with the Trustee's sale, that order recited that Appellees might "with the consent of this Court proceed to have the power of sale * * * exercised." If the

Commissioner's language in the phrase just quoted meant that he was giving the consent of the Court by that Order, such was beyond his power under subsection (o) of Section 75 of the Act since only a District Judge had that power. If he meant that an Order was to be obtained from a Judge of the District Court, no such Order was ever obtained.

The actual suggestion in Mr. Stone's letter of March 21st was that Mr. Avery, of the Randolph Marketing Company was to take all of the grapefruit on the trees. Mr. Hoffmann's reply was limited in its tentative consent, subject to conditions which were never met, to whatever sum was necessary to reimburse Randolph Marketing Company for its advances.

Mrs. Smith testified that the possession agreement enclosed with Mr. Hoffmann's letter of March 26th contained a phrase admitting that Appellants had had a fair trial under subsection (a-r) and were unable to show any results and were willing to voluntarily ask the Commissioner to dismiss the case [142]. Appellants refused to sign this and later in May, 1941, accompanied by Mr. Hoffmann, Mr. Andrews brought another agreement which omitted all that objectionable part [141-142].

Mr. Shirley, then attorney for Appellants, offered to prove by Mrs. Smith that Mr. Andrews misstated the effect of this modified possession agreement which she did sign on or about the 1st of May, 1941, telling her "that the Bank didn't have any intention of doing anything ex-

cept working the grove, and * * * that the agreement just covered the right to work the grove and that was the extent of it" [144-145, 141-142, 148]. Mrs. Smith further testified that when she did sign this possession agreement, no consideration was given [149].

Mr. Shirley further offered to prove by Mrs. Smith that the Bank induced her by "hallucinations on its part, and conversations, to wait; and that she was depending upon them to take some action which they never took to work out the situation in a manner that would not require her to go under (s)" [153, 159].

Mrs. Smith further testified that she never gave any indication to the Bank or any of its officers that she was willing to give up or waive her rights under subsection (s) and that she never authorized anybody else to do that in her behalf [155-157].

Clearly these facts even as interpreted by the District Judge, do not amount to a waiver as a matter of law. It has been held by the Federal Courts that the essence of waiver is estoppel and that the party claiming the waiver must have been misled and must have changed its position.

Amsinck & Co. v. Springfield Grocer Co., 7 Fed. (2d) 855, 860.

In the present case, Appellees were not misled and never changed their position. The three documents relied on as constituting the waiver were dated in March and May, 1941 and yet up to June 11, 1942, when Appellants were adjudicated bankrupts under subsection (s)

there is no evidence of any change of position by Appellees. Surely one cannot stand by without taking any action in reliance on the alleged waiver and even take other inconsistent steps and then afterward claim there was a waiver.

From the above review of the evidence actually before Commissioner Ginsburg, we submit that he was justified in holding that Appellants were entitled to be adjudicated under subsection (s). While in his Order of December 17, 1942, the Commissioner did not refer to waiver or estoppel, those questions had been raised by paragraph 12 of the Petition to Dismiss, filed before him [31].

It has frequently been held that a District Judge should not reverse a Conciliation Commissioner where the Judge himself hears no new evidence unless the facts are capable of only one interpretation or unless the Commissioner acted on an entirely erroneous view of the law. (*Dunsdon v. Federal Land Bank,* 137 Fed. (2d) 84 and 53 Am. B. 488.)

Here Judge Beaumont had to hold that the Commissioner was wrong, both as to law and facts in order to reach a contrary conclusion. We respectfully submit that the District Judge has attempted to read into Mr. Stone's letter of March 21, 1941 [166] an unqualified waiver which was not there and to entirely disregard the conditions set up in Mr. Hoffmann's reply [34] which were never complied with and also to disregard the uncontradicted testimony of Mrs. Smith regarding the circumstances occurring when she signed the possession agreement [144-145, 141-192, 148], all of which additional evidence establishes that no waiver was in fact made.

II.

The District Court Should Have Granted the Petition for Rehearing in Order to Permit the Presentation of Further Oral and Documentary Evidence to Show There Was No Waiver.

We have pointed out that the evidence received by the Commissioner was sufficient to establish that Appellants did not waive their right to be adjudicated under (s) and that the District Court erred in holding otherwise. Even if his decision had been justified on the evidence before him, it would still have been his duty on the showing made on the Petition for Rehearing by the affidavit of Allan J. Carter and the three letters set forth there as exhibits, to have opened the case up for further evidence.

There have been at least three different attorneys representing appellants prior to present counsel, two of them having been called into the armed services [63]. The record of the hearing before Commissioner Ginsburg on September 3, 1942, shows that Mr. Marlin H. Shirley who had then succeeded Mr. Stone, assumed that all the letters making up the correspondence between Mr. Hoffman and Mr. Stone were in the record [122, 133, 163].

At the very end of that hearing, this colloquy took place between counsel:

> "Mr. Shirley: Are we agreed that all these letters on the part of the bank are introduced into evidence, Mr. Smith?
>
> Mr. Smith: Make an offer. He previously ruled that the letters were all part of the record in the case.

Mr. Shirley: Well, that is all I wanted to know.

Mr. Smith: The entire record is in evidence" [163].

Certainly Mr. Shirley was justified by Mr. Percy Smith's statement in assuming that all letters written by the Land Bank as to this point were in the record. The Commissioner said he didn't choose to take time for Mr. Shirley "to read all the letters in the file" but that they could all be read by the District Judge or whoever had to decide the case [163].

However, when the case came to be heard by Judge Beaumont, Mr. LeRoy McCormick had succeeded Mr. Shirley as counsel for Appellants [64] and only the two letters heretofore commented on were before the Court. When the undersigned followed Mr. McCormick as counsel for Appellants he obtained from Appellants carbons of two further letters which Mr. Stone sent to Mr. Hoffmann and the original of Mr. Hoffmann's reply of April 9, 1941. Copies of these were then set up as exhibits in support of the petition for rehearing [81-83].

When considered with the earlier letters, these three documents show conclusively that our interpretation of those earlier letters above set forth, was correct and that there had been no waiver.

Mr. Stone received Mr. Hoffmann's letter of March 26th on the following day, March 27, 1941, and answered it at once, saying:

> "*I have forwarded your letter* and one copy of each document *to the Smiths for their consideration. Just*

as soon as they advise me whether or not they are willing to enter into the agreement as suggested by you, I will in turn immediately notify your office.' [81.] (Emphasis ours.)

On April 3, 1941, Mr. Stone wrote again to Mr. Hoffmann that the Smiths had gone over the matter, but before proceeding, they wanted to find out whether the Land Bank would consider a scale down arrangement "whereby the debtor might pay off the indebtedness and keep the property" [82].

On April 9, 1941, Mr. Hoffman replied that they could not agree to a voluntary scale down. He concluded his letter with the statement:

> "We would like very much to have the matter handled as suggested in our last letter, if Mr. and Mrs. Smith have not changed their minds" [83].

This letter did two very important things. It again insisted on the conditions set out in the letter of March 21 which we have seen never were met by Appellants. Also, it showed that the Land Bank, realizing that the Smiths might have changed their minds, was not relying on any waiver. The uncontradicted fact that three weeks later on May 1, 1941, Mr. Hoffmann and Mr. Andrews were presenting a modified form of possession agreement to Mrs. Smith [139-141] shows that the Land Bank was pursuing a different course. So far as the record discloses, nothing further was ever said about Appellants filing a consent dismissal and none was ever filed.

Clearly there never was any waiver.

III.

There Was No Valid Consideration for Any Waiver Agreement.

The District Judge in his Memorandum Opinion and in his Findings has treated the exchange of the two letters of March 21 and March 26, 1941 as constituting a binding agreement between the parties. Even if it had been an agreement, it would not have been an enforceable contract because there was no valid consideration moving to Appellants. This point was made by Mr. Shirley at the hearing on September 3, 1942 [139]. Mrs. Smith testified there was no consideration [149] and Mr. Shirley stated that the record showed the Randolph Marketing Company already had the right to market the fruit [149].

In a somewhat similar situation, the Circuit Court of Appeals for the Eighth Circuit held that there was no consideration for the agreement admittedly made: *Buss v. Prudential Insurance Co.*, 126 Fed. (2d) 960. In that case a farmer filed under Section 75 without joining his wife who owned a half interest as a tenant in common. After failing to reach an agreement with his creditors, he filed under subsection (s). Thereafter the creditor asked leave to proceed with foreclosure of its mortgage. The attorney for the farmer then signed and filed a written agreement consenting to foreclosure and the appointment of a receiver who was to lease the farm to the farmer for two years on crop share rental which would go to the farmer if the property was redeemed, other-

wise to the mortgagee. That proceeding under (s) was afterward dismissed and no appeal taken.

Later the farmer and his wife filed a new joint proceeding under Section 75 which was dismissed by the District Court on recommendation of the Commissioner on the ground that the former proceeding was *res adjudicata*. That decision was reversed by the Court of Appeals. Concerning the signed agreement, the Court said, page 965:

> "The record of the former proceeding under the statute by Walter Clifford Buss is set out in full, and is admitted. Buss admits that an agreement was made in that proceeding but says that he never saw it. The agreement in the record appears to have been signed by counsel. There is no evidence to the effect that either appellant ever received any consideration for the agreement. There is no showing that the agreement was ever performed by either party to it."

So in our case, there was no consideration and therefore on this separate ground the holding of the District Court should be reversed.

IV.

Neither Mr. Stone Nor Mr. McCormick Had Any Power to Waive Appellants' Rights to Be Adjudicated Under (s) Nor Did They Intend to Waive Such Rights.

Generally an attorney has no right to compromise a Cause of Action without express authority so to do.

Barber-Coleman Co. v. Magnano Corporation, 299 Fed. 401.

Note 66 A. L. R. 108 and cases there cited.

This rule applies with even greater force to a release or waiver of a right and it has been so held by this Court:

Bruun v. Hanson, 103 Fed. (2d) 685, at 701.

In the absence of a specific authority the client must acquiesce after full knowledge of all the facts, before being bound. No such acquiescence occurred here as to Mr. Stone's letter of March 21, 1941. On the contrary as we have seen the later correspondence shows that he consulted the clients and they declined to do the things Appellees insisted must be done before they would agree to any program.

The position is very much weaker as to the alleged waiver by Mr. McCormick in his statement of facts [63]. He merely said that Appellees' statement of facts "appears to be substantially borne out by the admission of debtors." This was merely a loosely phrased legal conclusion which is never binding on a client as an admission.

5 *Amer. Jur.* par. 94, page 316.

V.

The Right of a Farmer-Debtor to Be Adjudicated a Bankrupt Under Subsection (s) Cannot Be Waived.

The fundamental benefits of Section 75 of the Act were granted to the farmers as a class.

Paradise Land & Livestock Co. v. Federal Land Bank 108 Fed. (2d) 832 at 834;

In re Loose, 52 Fed. Supp. 20 at 24.

It has been repeatedly held that under Section 75 of the Act the farmer can not waive any of his substantive rights nor any of the essential elements of the procedure set up by the statute.

Borchard v. California Bank, 310 U. S. 311, 84 L. Ed. 1222, 60 S. Ct. 957;

Wright v. Logan, 315 U. S. 139, 84 L. Ed. 443;

Paradise Land and Livestock Company v. Federal Land Bank, 118 Fed. (2d) 215;

Corey v. Blake, 136 Fed. (2d) 162.

It has been held that an agreement to waive the benefit of the general bankruptcy act is void. This was decided in the case of *In re Weitzen*, 3 Fed. Supp. 698, 23 A. Bn. 653. The District Judge there said, page 698:

> *"The agreement to waive the benefit of bankruptcy is unenforceable. To sustain a contractual obligation of this character would frustrate the object of the Bankruptcy Act, particularly of section 17* (11 U. S. C. A., sec. 35). This was held by the Supreme Judicial Court of Massachusetts, *Federal Nat. Bank v. Koppel,* 253 Mass. 157, 148 N. E. 379, 380, 40 A.

L. R. 1443, where it was said: 'It would be repugnant to the purpose of the Bankruptcy Act to permit the circumvention of its object by the simple devise of a clause in the agreement out of which the provable debt springs, stipulating that a discharge in bankruptcy will not be pleaded by the debtor. The Bankruptcy Act would in the natural course of business be nullified in the vast majority of debts arising out of contracts, if this were permissible. It would be vain to enact a bankruptcy law with all its elaborate machinery for settlement of the estates of bankrupt debtors, which could so easily be rendered of no effect. The bar of the discharge under the terms of the Bankruptcy Act is not restricted to those instances where the debtor has not waived his right to plead it. It is universal and unqualified in terms. It affects all debts within the scope of its words. *It would be contrary to the letter of section 17 of the Bankruptcy Act as we interpret it to uphold the waiver embodied in this note. So to do would be incompatible with the spirit of that section. Its aim would largely be defeated.*'" (Emphasis ours.)

A similar statement of this same rule was made by Hon. Ralph E. Jenney of our District Court in connection with a reorganization proceeding under Section 77(B) of the Bankruptcy Act. This was the case of *In re Los Angeles Lumber Products Co., Ltd.*, 24 Fed. Supp. 501, 47 A .Bn. 688, where it was urged that the language of a trust indenture precluded the debtor corporation from voluntarily taking advantage of Section 77(B) of the Act. Judge Jenney said, page 515:

"* * * *any such attempted restriction upon the debtors' rights even in a voluntary proceeding would seem to this court to be void, as contrary to public*

> *policy.* The court does not believe that the company could place itself, or that the bondholders did place themselves by this agreement which is binding upon all parties, in such a position that advantage could not be taken of this section of the Bankruptcy Act. In that connection see: *In re Weitzen,* D. C. 3 F. Supp. 698, 23 A. B. B., N. S., 653; *Federal National Bank v. Koppel,* 253 Mass. 157, 148 N. E. 379, 40 A. L. R. 1443, t A. B. R., N. S., 287." (Emphasis ours.)

This same doctrine has been applied recently in several farm-debtor cases.

In *Trego v. Wright,* 111 Fed. (2d) 990, the farmer's property was sold under foreclosure on July 21, 1934. Five days before the sale took place, the farmer asked the State Court to postpone the sale to February 1, 1935. The State Court then entered a formal Order reciting (p. 990) that:

> "By agreement of the parties * * * the sale * * * will not be confirmed until the defendant, Grover C. Trego shall have reasonable opportunity to redeem * * * but in no event shall the time for redeeming said premises extend beyond the first day of February, 1935."

The farmer did not redeem his property and the sale was confirmed February 11, 1935. In the meantime on January 26, 1935, the farmer filed a petition in the Federal Court under Section 75. His offer of composition was rejected and on November 6, 1935, he was adjudicated

a bankrupt under subsection (s). A year later he asked the Federal Court to vacate the orders made by the State Court confirming the sale of his property. The District Court dismissed the proceedings under Section 75 saying among other things that the State Court had merely carried out the terms of the farmer's agreement made in open court. The Circuit Court of Appeals in reversing the District Court, said in part, page 991:

> "Unless the agreement above quoted estops appellant from taking advantage of the provisions of Section 75, subsection s, clearly the order of the District Court must be reversed. * * * Neither did the agreement made by the appellant prior to the second enactment of subsection s, estop appellant from asserting his rights under the amendment. The agreement did not waive the right to assert such rights, and *if it had it would have been void as against public policy.*" (Emphasis ours.)

A similar result was reached by the same Circuit Court of Appeals in the later case of *Federal Land Bank v. Morrison,* 133 Fed. (2d) 613. In that case, during the (a-r) proceedings, the debtors consented to the appointment of a receiver. Afterward, the debtors were adjudicated bankrupts under subsection (s). Concerning the consent agreement to the appointment of the receiver, the Circuit Court of Appeal said, page 617:

> "This is true irrespective of the consent agreement. *The debtors and creditors could not waive nor modify the provisions of Section 75. Trego v. Wright,* 6

> Cir., 111 F. (2d) 990. A similar stipulation between secured creditor and debtor, dealing with the disposition of the proceeds of crops harvested on the debtor's premises, was held by the Supreme Court in *Borchard v. California Bank,* 310 U. S. 311, 317, 60 S. Ct. 957, 84 L. Ed. 1222, to be part of a 'procedure not contemplated by the statute'." (Emphasis ours.)

In the case of *Hepker v. Equitable Life Assurance Society,* 131 Fed. (2d) 926, the farmer, after filing under (a to r) and while attempting to work out a composition orally agreed in the presence of the Commissioner that if negotiations for compostion failed she would pay rent for the year 1941 in an amount to be fixed by the Commissioner. The negotiations failed and the farmer filed under (s) on August 5, 1941. The Commissioner thereafter ordered rent to be paid from March 1, 1941. The District Judge modified this by requiring rent from date of adjudication. The mortgagee on cross-appeal attempted to sustain the requirement to pay rent from March 1st relying on the farmers' agreement. The Circuit Court of Appeals said, page 927:

> "It is argued that the agreement may be treated as a waiver by the debtor of her right to have the rent order fixed in due course of bankruptcy proceedings under the statute, but *we think the statute and not the agreement made six months before bankruptcy must control.* The relief sought by the cross appeal is denied." (Emphasis ours.)

VI.

The Term of Appellants' Extension Proposal Did Not Expire on November 2, 1940, and the Findings of the Commissioner and of the District Court Covering That Point Should Be Set Aside.

While we believe that the several propositions discussed above require a reversal of the Order entered by the District Court on September 17, 1943, without regard to the Court's finding that Appellants' extension proposal expired on November 2, 1940, nevertheless we believe that finding was erroneous and should be corrected. The extension proposal itself did not express November 2, 1940, as a termination date [3-19]. That proposal after setting up a plan for the first year of the extension period [11], had a sub-heading [15]:

> "During second, third years and remaining portion of said extension."

The opening sentence under this heading read [15]:

> "That during the second and third years of said proposal and said extension, and during the balance of any extended period given to these debtors * * * said debtors propose * * *"

We submit that the above heading and opening phrases would each be meaningless unless they referred to some period after the end of the third year.

At the hearing in the District Court, it was claimed that since a similar finding that the extension proposal

had expired on November 2, 1940, was included in the findings of Commissioner Ginsburg's Order of February 9, 1942, and no appeal was taken from that Order, the finding had become *res judicata* against appellants.

Appellants' position is that the Commissioner's Order of February 9, 1942, was void and not voidable for the reason that under Section 75 of the Act, the District Judge was the only one who had power to permit a creditor to foreclose. This power is set up in subsection (o) of Section 75 of the Act. This subsection reads in part:

> "Except upon petition made to and granted by the Judge after hearing and report by the Conciliation Commissioner, the following proceedings shall not be instituted * * *.
>
> "(2) Proceedings for foreclosure of a mortgage on land * * *"

A leading decision construing this subsection is one by this Court in *McFarland v. Westcoast Life Insurance Co.*, 112 Fed. (2d) 567.

It is true that this subsection also contained the phrase "prior to the confirmation or other disposition of the composition or extension proposal by the Court," which this Court has held meant that the restriction against further action by a state court was not automatically stayed by adjudication under (s); *Hardt v. Kirkpatrick*, 91 Fed. (2d) 875. Nevertheless, it has been construed in the light of more recent decisions of the United States Supreme Court, to control as to matters arising in later proceedings under Section 75. (*Bastian v. Erickson*, 114 Fed. (2d) 338 at 340.) Applying this construction to the present

case, Commissioner Ginsburg had no authority whatever to issue an Order permitting Appellees to proceed to foreclose and any attempt on his part to do so was void and not merely voidable.

We have already referred to the phrase in his Order of February 9, 1942, "with the consent of this Court." If that phrase meant that he was submitting a report to the Judge for his consideration and action, it was proper procedure but since that Order never was presented to any District Judge for his approval, no Order on the subject ever became effective. If, by the phrase quoted, the Commissioner meant that he was by his own Order, giving the Court's consent, we submit that it was beyond his power to do so.

Even if the Commissioner's finding were merely voidable and not void, it would still be subject to being set aside and vacated unless rights have become vested in reliance upon it which will be disturbed by its being set aside. (*Wayne United Gas Co. v. Owens Illinois Gas Co.*, 300 U. S. 131, 136-137, 81 L. Ed. 557 at 561, 60 S. Ct. 773; *Wharton v. Farmers and Merchants Bank*, 119 Fed. (2d) 487 at 489.)

There is no evidence whatever in the present record to indicate that Appellees did anything between the time of the entry of Commissioner Ginsburg's Order of February 9, 1942, and June 11, 1942, when Appellants were adjudicated bankrupts under subsection (s). Nor is there any evidence that Appellees have done anything which has changed their position, even up to this date.

The similar finding by the Commissioner that the extension proposal expired November 2, 1940, in his Order of

December 17, 1942, sustaining Appellants' right to be adjudicated under (s) and an identical finding by Judge Beaumont in his Order of September 17, 1943, are now properly before the Court on this Appeal and therefore subject to being set aside as being contrary to the terms of the extension proposal itself as set forth above.

If we are correct in the proposition that the extension proposal did not provide for its termination on November 2, 1940, any attempt by either the Commissioner or the District Judge to alter the terms of the proposal by providing such a termination date, other than by the procedure outlined in subsection (1) of Section 75 of the Bankruptcy Act, would be void as an attempt to modify the contract rights of the debtors herein under said extension proposal agreement in violation of the Constitutions of the United States and the State of California.

Conclusion.

We respectfully submit that on all of the grounds above set forth, the orders of the District Court of September 17, 1943, and October 25, 1943, should be reversed, and Appellants be permitted to continue operating the grove under subsection (s) continuing to pay the rent provided for under the stay order of November 2, 1942.

Respectfully submitted,

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